FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

Published Between April 1, 2013, and March 31, 2014

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INTRODUCTION

This outline documents the published decisions of the Fourth Circuit over the past twelve months that address criminal law and procedure issues, primarily on direct appeal. Decisions that represent defense wins or otherwise contain defense-favorable findings are marked by an exclamation point (!). Decisions that, in the compiler's judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked by an asterisk (*). Note that not every issue raised in a decision is reflected in the outline. Please report errors or omissions in the outline to the compiler at fran_pratt@fd.org.

I. OFFENSES

36 C.F.R. § 2.34, Disorderly Conduct

! *United States v. Lanning*, 723 F.3d 476 (4th Cir. July 19, 2013) (Wynn, J.) (W.D.N.C.) (finding evidence insufficient to support defendant's conviction where, after park police officer engaged in flirtatious conversation with defendant and indicated to defendant that he wanted to engage in homosexual sex with defendant, defendant briefly touched officer's fully-clothed crotch; holding obscenity prong of regulation unconstitutionally vague as applied to defendant)

18 U.S.C. § 922(g), Possession of Firearm or Ammunition by Prohibited Person

United States v. Al Sabahi, 719 F.3d 305 (4th Cir. June 12, 2013) (Floyd, J.) (E.D.N.C.) (in case involving illegal alien in possession of firearm, rejecting defendant's arguments that, although he had overstayed his visa, he was lawfully in United States because he had voluntarily registered with National Security Entry - Exit Registration System (NSEERS) and had submitted I-485 application for adjustment of status after marrying U.S. citizen)

United States v. Royal, 731 F.3d 333 (4th Cir. Oct. 1, 2013) (Diaz, J.) (D. Md.) (in case involving possession of ammunition loaded in antique firearm, holding that government need not prove that ammunition was designed for use in non-antique firearm to obtain conviction; rather, burden is on defendant to raise affirmative defense that ammunition was designed to fit only antique firearms; in light of holding, further finding that district court properly instructed jury on definition of "ammunition")

United States v. Kerr, 737 F.3d 33 (4th Cir. Dec. 3, 2013) (Diaz, J.; Davis, J., dissenting) (M.D.N.C.) (defendant's convictions and sentences under North Carolina's Structured Sentencing

Act constituted felonies for purposes of conviction under § 922(g)(1) where defendant's presumptive range set a maximum sentence of 14 months; thus, defendant faced sentence in excess of one year in prison, even though state judge sentenced defendant within lower mitigating range, which set maximum of only 11 months' imprisonment)

18 U.S.C. § 924(c), Use or Carry of Firearm

! *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. Feb. 26, 2014) (Wynn, J.) (M.D.N.C.) (in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013), vacating defendant's sentence and remanding for resentencing where jury did not find that defendant had brandished firearm during Hobbs Act robbery)

United States v. Blackman, ___ F.3d ____, 2014 WL 1099271 (4th Cir. Mar. 21, 2014) (Wilkinson, J.) (E.D. Va.) (where defendant charged with § 924(c) brandishing offense and § 2 in connection with Hobbs Act robbery conspiracy (but no substantive Hobbs Act robbery charges), defendant's conviction on § 924(c) under *Pinkerton v. United States*, 328 U.S. 640 (1946), was appropriate even though indictment did not reference *Pinkerton*; further, evidence was sufficient to support *Pinkerton* liability where defendant's co-conspirators testified that he was privy to pre-robbery discussions that included explicit references to use of firearm and firearm was actually brandished during each robbery)

18 U.S.C. § 956, Conspiracy to Commit Murder, Kidnapping, Maiming, or Injury Outside the United States

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (finding evidence sufficient to support convictions in terrorist prosecution)

18 U.S.C. §§ 1028, 1028A, Identification Fraud, Aggravated Identity Theft

United States v. Otuya, 720 F.3d 183 (4th Cir. June 19, 2013) (Wilkinson, J.) (D. Md.) (in aggravated identity theft case, rejecting defendant's argument that he had "lawful authority" to use co-conspirator's identification where he had that person's consent, both because a person cannot consent to commission of unlawful act and because means of identification does not have to be illicitly procured for it to be used "without lawful authority")

18 U.S.C. § 1035, False Statements Relating to Health Care Matters

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (finding evidence sufficient to support convictions in case involving scheme to defraud insurers by submitting claims for medically unnecessary coronary stent procedures)

18 U.S.C. § 1341 *et seq.*, Mail and Wire Fraud

United States v. Abdulwahab, 715 F.3d 521 (4th Cir. Apr. 29, 2013) (Traxler, J.) (E.D. Va.) (in challenge to sufficiency of evidence in mail fraud and securities fraud case relating to investment scheme resulting in nearly $100 million in losses to investors, finding evidence to be extensive)

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (rejecting as-applied challenge to health care fraud statute, 18 U.S.C. § 1347, as unconstitutionally vague where defendant claimed that no clear standard of medical necessity governed medical procedures at issue in case, and thus defendant could not know in advance that his conduct was prohibited: "The health care fraud statute is not a medical malpractice statute, it is a simple fraud statute.")

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (finding evidence sufficient to support conviction in case involving scheme to defraud insurers by submitting claims for medically unnecessary coronary stent procedures)

18 U.S.C. § 1651, Piracy

United States v. Shibin, 722 F.3d 233 (4th Cir. July 12, 2013) (Niemeyer, J.) (E.D. Va.) (defendant could be convicted of aiding and abetting piracy even though he was not actually on the high seas (i.e., in international waters) at the time of the piracy, so long as he incited or intentionally facilitated piratical acts; district court had subject matter jurisdiction over offense pursuant to international law doctrine of "universal jurisdiction")

18 U.S.C. § 1951, Hobbs Act

! * *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. Feb. 26, 2014) (Wynn, J.) (M.D.N.C.) (as to one defendant on one Hobbs Act count, finding evidence insufficient to support conviction where defendant was not identified by store owner at trial; government expert could not testify about when defendant's partial fingerprint found on duct tape was imprinted; and firearm stolen from store was no longer "recently stolen" by time it was found in car that defendant was driving two months later; rejecting as "little more than impermissible propensity argument" government's argument that defendant's conspiring to commit second robbery was probative of guilt on first robbery) (N.B.: decision contains analysis of cases relating to fingerprint evidence)

18 U.S.C. § 1956, Money Laundering

! * *United States v. Abdulwahab*, 715 F.3d 521 (4th Cir. Apr. 29, 2013) (Traxler, J.) (E.D. Va.) (defendant's substantive convictions for money laundering were barred by "merger problem" identified in *Santos v. United States*, 553 U.S. 507 (2008), where proceeds from underlying fraud scheme were used as payments for services that were critical to success of scheme, and thus were essential expenses of scheme, not net profit; reviewing similar challenge to money laundering conspiracy conviction for plain error and finding no merger problem) (N.B.: note that Congress amended money laundering statute in May 2009 to redefine "proceeds" to include "gross proceeds"

in order to effectively overrule *Santos*; thus, *Santos* applies only to offenses committed before amendment of statute)

! *United States v. Simmons*, 737 F.3d 319 (4th Cir. Dec. 11, 2013) (Motz, J., Niemeyer, J., dissenting) (W.D.N.C.) (reversing money laundering convictions because transactions forming basis of prosecution constituted essential expenses of underlying Ponzi scheme involving securities fraud, and thus were barred by *Santos* merger problem) (N.B.: see note in preceding listing)

18 U.S.C. § 2250, Failure to Register as Sex Offender

United States v. Bridges, 741 F.3d 464 (4th Cir. Jan. 27, 2014) (Thacker, J.) (W.D. Va.) (plea of *nolo contendre* to attempted sexual battery in Florida, in which adjudication was withheld, qualifies as conviction within meaning of SORNA because it resulted in penal consequence of two years of probation, thus triggering SORNA registration requirements)

18 U.S.C. § 2320, Trafficking in Counterfeit Goods

! *United States v. Cone*, 714 F.3d 197 (4th Cir. Apr. 15, 2013) (Agee, J.; Wynn, J., concurring in part, dissenting in part) (E.D. Va.) (holding that government's theory of prosecution based on a "material alteration" theory of counterfeiting trademarks is not cognizable under criminal counterfeiting statute based on the facts of case, i.e., that "criminal liability under § 2320 cannot be based on the alteration of a product to which a genuine mark was affixed [but where] the mark itself has not been altered")

18 U.S.C. § 2339A, Providing Material Support to Terrorists

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (defendants' rights to free speech were not violated in terrorism material support case under 18 U.S.C. § 2339A where defendants were not prosecuted merely for their expressions of support for terrorist organization but for their actions in furtherance of their agreement to join one another in a common terrorist scheme by undergoing weapons training, traveling abroad, and recruiting others; further, use of defendants' speech as evidence of conspiracy, motive, and intent was "entirely consistent" with First Amendment)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (finding evidence sufficient to support convictions in prosecution for conspiring to provide material support to terrorists under 18 U.S.C. § 2339A)

18 U.S.C. § 2423, Transportation of Minors

United States v. Washington, 743 F.3d 938 (4th Cir. Feb. 28, 2014) (Diaz, J.) (E.D. Va.) (where defendant was pimping fourteen-year-old girl, a runaway who was already engaging in prostitution before defendant met her and who represented to defendant that she was nineteen, district court did not err in instructing jury that government did not have to prove that defendant

knew that victim was a minor; rejecting defendant's argument that earlier decision so holding was no longer good law in light of *Flores-Figueroa v. United States*, 566 U.S. 646 (2009))

21 U.S.C. § 841 *et seq.*, Drug Offenses

United States v. Ali, 735 F.3d 176 (4th Cir. Nov. 14, 2013) (Niemeyer, J.) (E.D. Va.) (in large-scale khat trafficking case, evidence was sufficient to establish defendants' scienter, i.e., that defendants knew that khat contained cathinone, a stimulant, and that cathinone is a controlled substance)

21 U.S.C. § 848, Continuing Criminal Enterprise (CCE)

United States v. Hager, 721 F.3d 167 (4th Cir. June 20, 2013) (Floyd, J.; Wynn, J., dissenting) (E.D. Va.) (21 U.S.C. § 848(e), which authorizes death penalty for intentional killing by person engaged in CCE, includes conspiracy to commit drug offense, not merely substantive drug offense; evidence was sufficient to establish both that defendant was engaged in drug conspiracy and that there was sufficient connection between that offense and killing, i.e., that defendant killed victim to eliminate threat he felt to himself and his drug trafficking activities; on plain error review, ruling that provision is neither void for vagueness in violation of Fifth Amendment's due process clause, nor does it violate Tenth Amendment)

22 U.S.C. § 2778, Arms Export Control Act

United States v. Bishop, 740 F.3d 927 (4th Cir. Jan. 28, 2014) (Wilkinson, J.) (E.D. Va.) (in prosecution for attempted export of ammunition without a license, government need show only that defendant knew that exporting ammunition was generally unlawful, not that he knew specifically why it was unlawful; government's evidence at bench trial was sufficient to support conviction)

II. FIRST AMENDMENT ISSUES

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (defendants' rights to free speech were not violated in terrorism material support case under 18 U.S.C. § 2339A where defendants were not prosecuted merely for their expressions of support for terrorist organization but for their actions in furtherance of their agreement to join one another in a common terrorist scheme by undergoing weapons training, traveling abroad, and recruiting others; further, use of defendants' speech as evidence of conspiracy, motive, and intent was "entirely consistent" with First Amendment)

III. FOURTH AMENDMENT ISSUES

Consent to Search

! *United States v. Robertson*, 736 F.3d 677 (4th Cir. Dec. 3, 2013) (Gregory, J.; Wilson, D.J., sitting by designation, dissenting) (M.D.N.C.) (where defendant did not consent to officer's search of his person but only begrudgingly surrendered to officer's orders to submit to search, search was invalid)

Expectation of Privacy

United States v. Castellanos, 716 F.3d 828 (4th Cir. May 29, 2013) (Agee, J.; Davis, J., dissenting) (M.D.N.C.) (defendant did not have reasonable expectation of privacy in vehicle in which drugs were discovered in gas tank where defendant did not establish that he owned vehicle at time of search or otherwise had legitimate possessory interest in vehicle)

United States v. Jackson, 728 F.3d 367 (4th Cir. Aug. 26, 2013) (Niemeyer, J.; Thacker, J., dissenting) (E.D. Va.) (where trash can was located on common property of public housing apartment complex, not next to apartment's rear door, can was beyond apartment's curtilage at time of trash pull and police did not intrude upon constitutionally protected area; further, given can's location, defendant lacked reasonable expectation of privacy in contents of can)

Probable Cause (see also Warrants, *infra*)

United States v. Johnson, 734 F.3d 270 (4th Cir. Oct. 29, 2013) (Duncan, J.) (D. Md.) (district court did not err in finding as factual matter that temporary tag on vehicle was bent and illegible based on testifying officers' credibility; further, court did not err as legal matter in finding that state of tag constituted probable cause for stop, notwithstanding officers' admissions that they would stop vehicles for minor violations in hope of getting information about more serious crimes)

United States v. Williams, 740 F.3d 308 (4th Cir. Jan. 23, 2014) (Wynn, J.) (D. Md.) (police officer had probable cause to pull defendant's vehicle over after observing vehicle stopped in middle of residential street for at least 30 seconds late at night, where even though officer identified conduct as illegal under section of Maryland law that did not apply to location of stop, defendant's conduct violated different section of law that prohibited stopping in residential area unless within a foot of curb or road edge)

Reasonable Suspicion

United States v. George, 732 F.3d 296 (4th Cir. Oct. 16, 2013) (Niemeyer, J.) (E.D.N.C.) (frisk of defendant was supported by reasonable suspicion where police stopped car at 3:30 a.m. in high crime area for giving chase to another car and running red light, and officer observed suspicious conduct of passenger, i.e., that passenger was holding up identification card with one hand while looking away from officer, he had other hand by his leg where it could not be seen and would not

put it on headrest in front of him, he would not show that hand to officer despite several requests, and he would not make eye contact with officer)

United States v. Johnson, 734 F.3d 270 (4th Cir. Oct. 29, 2013) (Duncan, J.) (D. Md.) (district court did not err in finding as factual matter that temporary tag on vehicle was bent and illegible based on testifying officers' credibility; further, court did not err as legal matter in finding that state of tag constituted basis for stop, notwithstanding officers' admissions that they would stop vehicles for minor violations in hope of getting information about more serious crimes)

United States v. McGee, 736 F.3d 263 (4th Cir. Nov. 18, 2013) (Davis, J.) (S.D. W. Va.) (district court did not clearly err in determining as factual matter that rear center brake light on rental car was malfunctioning based on its findings about police officer's credibility, notwithstanding defense evidence from rental car company that light worked properly several months later and that no reports of a malfunctioning light had been made around time of traffic stop)

United States v. Williams, 740 F.3d 308 (4th Cir. Jan. 23, 2014) (Wynn, J.) (D. Md.) (police officer had reasonable suspicion to pull defendant's vehicle over after observing vehicle stopped in middle of residential street for at least 30 seconds late at night, where even though officer identified conduct as illegal under section of Maryland law that did not apply to location of stop, defendant's conduct violated different section of law that prohibited stopping in residential area unless within a foot of curb or road edge)

Traffic Stops

United States v. Johnson, 734 F.3d 270 (4th Cir. Oct. 29, 2013) (Duncan, J.) (D. Md.) (district court did not err in finding as factual matter that temporary tag on vehicle was bent and illegible based on testifying officers' credibility; further, court did not err as legal matter in finding that state of tag constituted basis for stop, notwithstanding officers' admissions that they would stop vehicles for minor violations in hope of getting information about more serious crimes)

United States v. McGee, 736 F.3d 263 (4th Cir. Nov. 18, 2013) (Davis, J.) (S.D. W. Va.) (district court did not clearly err in determining as factual matter that rear center brake light on rental car was malfunctioning based on its findings about police officer's credibility, notwithstanding defense evidence from rental car company that light worked properly several months later and that no reports of a malfunctioning light had been made around time of traffic stop)

United States v. Green, 740 F.3d 275 (4th Cir. Jan. 17, 2014) (Shedd, J.) (W.D. Va.) (scope and duration of traffic stop were not unreasonably long or unrelated to basis for stop where three minutes were spent waiting for response to verify defendant's driver's license and vehicle registration and four more minutes were spent waiting on criminal history check out of concern for officer safety based on protective order and defendant's demeanor and behavior)

United States v. Green, 740 F.3d 275 (4th Cir. Jan. 17, 2014) (Shedd, J.) (W.D. Va.) (in challenge to reliability of drug dog used during traffic stop, applying framework of *Florida v. Harris*,

133 S. Ct. 1050 (2013), and affirming district court's ruling that "Bono" was sufficiently reliable and that his positive alert provided probable cause for search of vehicle)

Warrants

United States v. Dargan, 738 F.3d 643 (4th Cir. Dec. 24, 2013) (Wilkinson, J.) (D. Md.) (sales receipt for Louis Vuitton belt, which was found on dresser in defendant's bedroom, fell within scope of attachment to warrant that listed "indicia of occupancy, residency, of the premises . . . including but not limited to, utility and telephone bills, [and] cancelled envelopes")

IV. FIFTH AMENDMENT ISSUES (Pre-trial and Trial)

Competency to Stand Trial

United States v. Chatmon, 718 F.3d 369 (4th Cir. June 10, 2013) (Wilkinson, J.) (E.D. Va.) (in reviewing defendant's challenge to district court's application of four-part test set out in *Sell v. United States* , 539 U.S. 166 (2003), for allowing forcible medication of defendant in order to render him competent to stand trial, finding that drug trafficking charge carrying ten-year mandatory minimum and maximum of life imprisonment under 21 U.S.C. § 841 constitutes "serious" crime giving rise to important government interest, but vacating and remanding for further findings when, in granting government's motion to permit forcible medication, district court failed to consider whether there were alternative means of rendering defendant competent that were less intrusive than forcible medication)

Due Process

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (in health care fraud case, government did not violate *Brady* obligations by failing to reveal handshake settlement with hospital in civil fraud investigation where information had little impeachment value and there was no reasonable probability it would have affected jury's verdict)

* *United States v. Hasan*, 718 F.3d 338 (4th Cir. June 6, 2013) (Agee, J.) (E.D. Va.) (in case involving Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341, undercover sales to defendant of untaxed cigarettes by ATF agents did not constitute government conduct so outrageous as to violate due process; giving overview of "outrageous government conduct" doctrine)

United States v. Hager, 721 F.3d 167 (4th Cir. June 20, 2013) (Floyd, J.; Wynn, J., dissenting) (E.D. Va.) (on plain error review, finding that 21 U.S.C. § 848(e), authorizing death penalty for intentional killing by person engaged in CCE, includes conspiracy to commit drug offense, not merely substantive drug offenses and that provision is neither void for vagueness in violation of Fifth Amendment's due process clause, nor violative of Tenth Amendment)

Self-Incrimination

! *United States v. Hashime*, 734 F.3d 278 (4th Cir. Oct. 29, 2013) (Wilkinson, J.) (E.D. Va.) (19-year defendant was in custody for purposes of *Miranda* when 15 to 30 law enforcement officers, equipped with battering ram, descended on his home; entered with guns drawn; ordered defendant outside his home clad only in boxer shorts; interrogated him in basement storage room; refused to allow his mother to see her son; and secretly recorded 3-hour interrogation; noting that inquiries for *Miranda* custody and voluntariness of statements are "not one and the same")

United States v. Johnson, 734 F.3d 270 (4th Cir. Oct. 29, 2013) (Duncan, J.) (D. Md.) (where defendant in custody, officer's question "What do you mean," made in response to defendant's voluntary proffer of information before he had been *Mirandized*, did not constitute custodial interrogation)

V. SIXTH AMENDMENT ISSUES (Pre-trial and Trial)

Confrontation

United States v. Cone, 714 F.3d 197 (4th Cir. Apr. 15, 2013) (Agee, J) (E.D. Va.) (substitution of "another individual" for defendant's name in out-of-court statements made by co-defendant on trial with defendant did not violate Confrontation Clause)

United States v. Jones, 716 F.3d 851 (4th Cir. May 29, 2013) (Diaz, J.) (E.D. Va.) (admission of statements by co-conspirators captured on recordings of phone calls with defendant while he was in jail before trial did not violate Confrontation Clause because statements were not "testimonial" in nature; rejecting defendant's contention that declarants' knowledge that calls were recorded, and thus could be used as evidence, made statements testimonial)

United States v. Dargan, 738 F.3d 643 (4th Cir. Dec. 24, 2013) (Wilkinson, J.) (D. Md.) (admission of jail inmate's testimony about co-defendant's statements to him, made while incarcerated together, in which co-defendant admitted to committing crime with two co-conspirators, did not violate Confrontation Clause because co-defendant's statements were plainly non-testimonial; further, there was no *Bruton* problem because co-defendant was not tried jointly with defendant and *Bruton* is irrelevant in context of non-testimonial statements)

United States v. Keita, 742 F.3d 184 (4th Cir. Feb. 6, 2014) (Wynn, J.) (D. Md.) (on plain error review in credit and debit card fraud case, introduction of business records related to cardholders did not violate Confrontation Clause because they are not testimonial)

Counsel

United States v. Beckton, 740 F.3d 303 (4th Cir. Jan. 21, 2014) (Motz, J.) (E.D.N.C.) (district court did not violate pro se defendant's right to counsel or his right to testify on his own behalf by

requiring defendant to pose questions to himself that he would answer, rather than testifying in narrative form or having stand-by counsel pose questions to him)

Impartial Jury

United States v. Jones, 716 F.3d 851 (4th Cir. May 29, 2013) (Diaz, J.) (E.D. Va.) (in case involving charges of arranging for fraudulent marriages between Navy sailors and foreign nationals, district court properly exercised discretion in declining to strike prospective juror for cause where juror, a host of radio talk show that discussed immigration issues and whose mother was naturalized citizen, asserted three times that she could be impartial and decide case based only on evidence presented in court)

VI. OTHER PRE-TRIAL ISSUES

Counsel in Death-Eligible Cases (18 U.S.C. § 3005)

United States v. Shepperson, 739 F.3d 176 (4th Cir. Jan. 8, 2014) (Agee, J.) (D. Md.) (on plain error review, where defendant failed to request additional counsel in death-eligible case in which government did not seek death penalty, district court had no obligation to inform defendant *sua sponte* that he could have additional counsel)

Discovery (Fed. R. Crim. P. 16)

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (where defendant violated Rule 16 by failing to disclose bases for his expert's opinions, district court did not abuse discretion by giving government option to voir dire expert one day before his testimony, rather than excluding testimony completely as government had requested)

Indictment

United States v. Shibin, 722 F.3d 233 (4th Cir. July 12, 2013) (Niemeyer, J.) (E.D. Va.) (district court did not err in denying motion to dismiss piracy counts for lack of subject matter jurisdiction or failure to state an offense; district court had subject matter jurisdiction over offense pursuant to international law doctrine of "universal jurisdiction," and defendant could be convicted of aiding and abetting piracy even though he was not actually on the high seas (i.e., in international waters) at the time of the piracy, so long as he incited or intentionally facilitated piratical acts)

United States v. Shibin, 722 F.3d 233 (4th Cir. July 12, 2013) (Niemeyer, J.) (E.D. Va.) (district court did not err in denying motion to dismiss indictment for lack of personal jurisdiction even though defendant was forcibly brought to United States from Somalia and was provided no opportunity to challenge his removal)

Speedy Trial Act / Continuances

United States v. Cherry, 720 F.3d 161 (4th Cir. June 13, 2013) (Duncan, J.) (E.D. Va.) (where defendant did not move prior to trial to dismiss indictment on ground that it was filed late, *see* 18 U.S.C. § 3161(b), defendant waived issue, as provided in § 3162(a)(2))

United States v. Mosteller, 741 F.3d 503 (4th Cir. Feb. 4, 2014) (Keenan, J.) (D.S.C.) (when district court granted mistrial on condition that defendant waive statutory speedy trial right, and second trial occurred more than 70 days after mistrial but defendant did not move to dismiss indictment on basis of statutory speedy trial violation, defendant cannot assert speedy trial violation for first time on appeal, and appellate court cannot review issue even for plain error, even though defendant's attempt to waive speedy trial right was null and void)

United States v. Keita, 742 F.3d 184 (4th Cir. Feb. 6, 2014) (Wynn, J.) (D. Md.) (district court did not err in denying motion to dismiss based on speedy indictment violation, as court properly excluded time granted for continuances for ongoing grand jury investigation and plea discussions where court found the delays served the ends of justice)

VII. TRIAL ISSUES[1]

Jury Selection

United States v. Jones, 716 F.3d 851 (4th Cir. May 29, 2013) (Diaz, J.) (E.D. Va.) (in case involving charges of arranging for fraudulent marriages between Navy sailors and foreign nationals, district court properly exercised discretion in declining to strike prospective juror for cause where juror, a host of radio talk show that discussed immigration issues and whose mother was naturalized citizen, asserted three times that she could be impartial and decide case based only on evidence presented in court)

United States v. Hager, 721 F.3d 167 (4th Cir. June 20, 2013) (Floyd, J.) (E.D. Va.) (district court did not abuse its discretion in capital trial by requiring that jurors be referenced only by number in courtroom, that juror list be kept under seal, and that defendant himself not be given copy of juror list, where defendant was previously convicted of obstruction of justice and government witnesses had expressed fear about testifying against defendant)

Evidence

Confrontation

See Sixth Amendment, *supra*

[1] Subsections are arranged by stage of trial.

Cross-examination

United States v. Zayyad, 741 F.3d 452 (4th Cir. Jan. 24, 2014) (Agee, J.) (W.D.N.C.) (in counterfeit drug case in which defendant did not raise any defense that he believed he was selling "gray market" drugs, district court did not abuse discretion in refusing to allow defense counsel to cross-examine government witnesses about gray market because evidence was not connected in any way to question of defendant's intent to sell counterfeit drugs, and thus was not relevant)

Federal Rules of Evidence 101 *et seq.*

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (district court did not err in refusing to admit, pursuant to rule of completeness, follow-up statements posted by defendant on website in response to comments about training video posted on site that was admitted where statements were not otherwise admissible under any exception to hearsay rule)

Federal Rules of Evidence 401 *et seq.*

United States v. Keita, 742 F.3d 184 (4th Cir. Feb. 6, 2014) (Wynn, J.) (D. Md.) (on plain error review in credit and debit card fraud case, evidence of business records related to cardholders not referenced in indictment was both relevant under Fed. R. Evid. 401 and not unduly prejudicial under Fed. R. Evid. 403)

United States v. Otuya, 720 F.3d 183 (4th Cir. June 19, 2013) (Wilkinson, J.) (D. Md.) (in bank fraud case, evidence of fraudulent activity seized from defendant's backpack at time of his arrest in 2010 was admissible as intrinsic to fraud scheme alleged to have occurred in 2008 and 2009 because it involved same series of transactions as charged offense; even if 2010 evidence was extrinsic, it was admissible under Rule 404(b))

United States v. Lespier, 725 F.3d 437 (4th Cir. Aug. 6, 2013) (King, J.) (W.D.N.C.) (in domestic murder case, evidence of defendant's prior threats and acts of violence against victim were properly admitted under Fed. R. Evid. 404(b) as evidence of intent and to disprove defendant's theory that victim accidentally shot herself; risk of unfair prejudice was mitigated by carefully framed limiting instructions)

United States v. Williams, 740 F.3d 308 (4th Cir. Jan. 23, 2014) (Wynn, J.) (D. Md.) (in case arising from traffic stop, district court did not abuse discretion by excluding under Fed. R. Evid. 404(b) defendant's evidence of prior police misconduct consisting of documents from decade-old civil suits against officers who had stopped defendant)

Federal Rules of Evidence 601 *et seq.*

United States v. Beckton, 740 F.3d 303 (4th Cir. Jan. 21, 2014) (Motz, J.) (E.D.N.C.) (district court did not abuse discretion under Fed. R. Evid. 611 in requiring pro se defendant who testified to pose questions to himself that he would answer, rather than testifying in narrative form or having stand-by counsel pose questions to him)

Federal Rules of Evidence 701 *et seq.*

United States v. Allen, 716 F.3d 98 (4th Cir. Apr. 26, 2013) (Gregory, J.) (W.D.N.C.) (finding no abuse of discretion in denial of defense motion to use as an expert a criminal defense attorney to explain legal significance of cooperation agreements and motions pursuant to § 5K1.1 and § 3553(e), and enhancement notices pursuant to 21 U.S.C. § 851, where defendant sought to use expert solely for the purpose of undermining the credibility of the co-defendant witnesses, a purpose not authorized by Rule 702)

United States v. Lespier, 725 F.3d 437 (4th Cir. Aug. 6, 2013) (King, J.) (W.D.N.C.) (in domestic murder case, district court did not abuse discretion in excluding defendant's psychology expert, who would have testified about sleep deprivation causing defendant's inconsistent explanation of events; effects of sleep deprivation, like problems with eyewitness identification, "are readily comprehended by jurors and do not require an expert for their explanation")

United States v. Ali, 735 F.3d 176 (4th Cir. Nov. 14, 2013) (Niemeyer, J.) (E.D. Va.) (in large-scale khat trafficking case, district court did not abuse discretion in excluding expert testimony about the stimulant substances in khat where defendants failed to give timely intent to use expert and expert's evidence was irrelevant)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (in prosecution for providing material support to terrorists under 18 U.S.C. § 2339A, district court did not abuse discretion in refusing to exclude testimony of government expert about Islamic extremism and meaning and context of various words and phrases used by defendants that are commonly used by person practicing extreme Islam, where court properly conducted *Daubert* gatekeeping obligation and did not err in deciding that testimony was both reliable and relevant)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (in prosecution for providing material support to terrorists under 18 U.S.C. § 2339A, district court did not abuse discretion in allowing opinions of lay witnesses when they testified to their understanding of statements made by defendants where statements were made in conversations between defendants and witnesses, such that law testimony was based on witnesses' perceptions) (N.B.: this ruling seems to conflict with ruling above about use of expert testimony)

Federal Rules of Evidence 801 *et seq.*

United States v. Shibin, 722 F.3d 233 (4th Cir. July 12, 2013) (Niemeyer, J.) (E.D. Va.) (testimony of FBI agent in rebuttal about prior inconsistent statements made by non-English-speaking defense witness was admissible; use of interpreter did not make statements hearsay, as interpreter was not declarant of statements but merely "language conduit")

! *United States v. Cone*, 714 F.3d 197 (4th Cir. Apr. 15, 2013) (Agee, J.) (E.D. Va.) (while finding error in admission of e-mails from customers in counterfeit trademark case as business records pursuant to Fed. R. Evid. 803(6)(B) where insufficient foundation was laid, and further

finding that district court erred in failing to give appropriate limiting instruction to jury, errors were harmless)

United States v. Dargan, 738 F.3d 643 (4th Cir. Dec. 24, 2013) (Wilkinson, J.) (D. Md.) (jail inmate's testimony about co-defendant's statements to him, made while incarcerated together, in which co-defendant admitted to committing crime with two co-conspirators, was admissible pursuant to Fed. R. Evid. 804(b)(3) where statements implicated co-defendant and were supported by corroborating circumstances)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (in prosecution for providing material support to terrorists under 18 U.S.C. § 2339A, addressing challenges to various hearsay statements that defendants contended were inadmissible; finding that statements were properly admitted because they provided background and context)

Federal Rules of Evidence 901 *et seq.*

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (district court did not err in admitting screen shots of Facebook pages, which included embedded YouTube files, where evidence was self-authenticating under Fed. R. Evid. 902(11) and was linked to defendants as required by Fed. R. Evid. 901(a))

Other Evidentiary Issues

United States v. Allen, 716 F.3d 98 (4th Cir. Apr. 26, 2013) (Gregory, J.) (W.D.N.C.) (district court did not err in denying defendant access to co-defendants' presentence reports prior to trial as defendant did not sufficiently identify specific information in presentence reports that would be material or favorable to defense, and co-defendants would be called as trial witnesses and thus could be cross-examined about plea agreements or any promises of leniency)

United States v. Shepperson, 739 F.3d 176 (4th Cir. Jan. 8, 2014) (Agee, J.) (D. Md.) (on plain error review in death-eligible case in which government elected not to seek death penalty, finding no error, much less plain error, in district court's admission of witness's testimony on ground that government did not provide witness list three business days in advance as per 18 U.S.C. § 3432)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (in prosecution for providing material support to terrorists under 18 U.S.C. § 2339A, district court did not err in denying defendants' motion to suppress FISA evidence or, alternatively, for disclosure of FISA materials, *see* 50 U.S.C. § 1806)

Sufficiency of Evidence

See Offenses, *supra*

Jury Instructions

United States v. Lespier, 725 F.3d 437 (4th Cir. Aug. 6, 2013) (King, J.) (W.D.N.C.) (in domestic murder case charged as first-degree murder where government requested that jury also be instructed on second-degree murder, which request district court declined, defendant cannot claim error on appeal in refusal to give lesser-included instruction when he invited error by successfully opposing instruction as matter of sound trial strategy)

United States v. Bartko, 728 F.3d 327 (4th Cir. Aug. 23, 2013) (Floyd, J.) (E.D.N.C.) (district court did not err in refusing to instruct jury on accomplice or informant testimony or on multiple conspiracies)

United States v. Ali, 735 F.3d 176 (4th Cir. Nov. 14, 2013) (Niemeyer, J.) (E.D. Va.) (in large-scale khat trafficking case, khat being a plant that contains cathinone, a controlled substance under U.S. law, district court correctly instructed jury that defendants had to know only that khat contained a controlled substance; court was not required to instruct that defendants had to know specifically that controlled substance was cathinone)

United States v. Ali, 735 F.3d 176 (4th Cir. Nov. 14, 2013) (Niemeyer, J.) (E.D. Va.) (in large-scale khat trafficking case, district court did not abuse discretion in giving instruction on willful blindness)

United States v. Hager, 721 F.3d 167 (4th Cir. June 20, 2013) (Floyd, J.; Wynn, J., dissenting) (E.D. Va.) (district court did not err in refusing to give defendant's proposed jury instruction in CCE murder case (21 U.S.C. § 848(e)), that defendant must be actively engaged in substantive drug offense at time of killing; instruction that court did give was correct statement of law)

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (in prosecution for providing material support to terrorists under 18 U.S.C. § 2339A where defendants asserted First Amendment defense, district court did not abuse discretion in refusing to give defendants' proposed instructions about First Amendment where court provided instruction describing First Amendment generally)

Return of Verdict / Jury Poll

! *United States v. Cherry*, 720 F.3d 161 (4th Cir. June 13, 2013) (Duncan, J.) (E.D. Va.) (on plain error review, finding error that was plain where, prior to polling jury, court told jury about defendant's criminal past; stating that "[t]o inject remarks that might influence jurors' decisions before they may be polled individually is . . . improper, . . . [a]nd because all district judges are no doubt aware of their duty to 'take special care to maintain an appearance of impartiality,' the court's error was plain;" but finding that defendant could not establish third prong of plain error because evidence against him was overwhelming)

Motion for New Trial

United States v. Bartko, 728 F.3d 327 (4th Cir. Aug. 23, 2013) (Floyd, J.) (E.D.N.C.) (where defendant moved for new trial on basis of false testimony by government witness, finding that testimony was false, but that it could not have affected jury's verdict)

United States v. Bartko, 728 F.3d 327 (4th Cir. Aug. 23, 2013) (Floyd, J.) (E.D.N.C.) (where defendant moved for new trial on basis of government's failure to disclose proffer agreement with witness, finding no *Brady* violation because while government had favorable impeachment evidence that it withheld, evidence was not material and defendant was not prejudiced by non-disclosure, where defense counsel had already thoroughly discredited witness, such that evidence of proffer agreement was cumulative and there was no reasonable probability that jury would have reached different verdict)

United States v. Bartko, 728 F.3d 327 (4th Cir. Aug. 23, 2013) (Floyd, J.) (E.D.N.C.) (where defendant moved for new trial on basis of government's failure to disclose tolling agreements with witness, finding no *Brady* violation because while government had favorable impeachment evidence that it withheld, evidence was not material where witness's testimony functioned as summary evidence that was corroborated by large amount of documentary evidence and testimony)

Conduct of Judge

! *United States v. Cherry*, 720 F.3d 161 (4th Cir. June 13, 2013) (Duncan, J.) (E.D. Va.) (on plain error review, finding error that was plain where, prior to polling jury, court told jury about defendant's criminal past; stating that "[t]o inject remarks that might influence jurors' decisions before they may be polled individually is . . . improper, . . . [a]nd because all district judges are no doubt aware of their duty to 'take special care to maintain an appearance of impartiality,' the court's error was plain;" but finding that defendant could not establish third prong of plain error because evidence against him was overwhelming)

VIII. PLEA ISSUES

Post-Conviction Vacutur of Guilty Plea

! *United States v. Fisher*, 711 F.3d 460 (4th Cir. Apr. 1, 2013) (Wynn, J.; Agee, J., dissenting) (D. Md.) (on appeal from denial of § 2255 motion, holding that defendant's plea was involuntarily made, in violation of his right to due process, where defendant did not know that police officer, who was later convicted of fraud, had falsified information in search warrant application that led to discovery of evidence and defendant's arrest where defendant relied heavily on affidavit in deciding to plead guilty)

IX. SENTENCING ISSUES

Constitutional Considerations

Sixth Amendment

United States v. Crawford, 734 F.3d 339 (4th Cir. Nov. 1, 2013) (Floyd, J.) (E.D.N.C.) (use of hearsay within hearsay – police officer's testimony about another police officer's telephone interviews of two informants – to set drug quantity does not violate Confrontation Clause in light of Fourth Circuit's decision in *United States v. Powell*, 650 F.3d 388 (4th Cir. 2011))

Eighth Amendment

* *United States v. Hashime*, 734 F.3d 278 (4th Cir. Oct. 29, 2013) (Wilkinson, J.; King, J., concurring) (E.D. Va.) (in case where court reversed convictions of 19-year-old defendant for child pornography offenses carrying 5- and 15-year mandatory minimums, noting with respect to defendant's Eighth Amendment sentencing challenge that, "in line with our own review of the custody issue and the district court's comments at sentencing, this was a case in which both police and prosecution applied a heavy foot to the accelerator. We do not doubt for an instant that the defendant's conduct here was reprehensible and worthy of both investigation and punishment, as the guilty plea attests. But attention to balance and degree often distinguishes the wise exercise of prosecutorial discretion from its opposite. For now we leave to the reflection of the appropriate authorities whether it was necessary to throw the full force of the law against this 19-year-old in a manner that would very likely render his life beyond repair."; King, J., wrote separately "to draw attention to a misperception of the law of this Court with respect to whether a sentence short of life imprisonment may be reviewed to ensure that it is constitutionally proportionate to the offense of conviction, and not cruel and unusual in contravention of the Eighth Amendment" and concluding that circuit precedent does in fact permit proportionality review for sentences of less than life imprisonment); *see also United States v. Hashime*, 722 F.3d 572 (4th Cir. June 10, 2013) (E.D. Va.) (Gregory, J., dissenting from denial of initial hearing en banc re. Fourth Circuit's refusal to consider Eighth Amendment challenges to sentences of less than life without parole)

United States v. Hunter, 735 F.3d 172 (4th Cir. Nov. 13, 2013) (Wynn, J.) (E.D.N.C.) (holding that application of ACCA's fifteen-year mandatory minimum penalty based on defendant's prior convictions for violent felonies he committed as juvenile, for which he was prosecuted as an adult, does not violate Eighth Amendment)

Sentencing Statutes

18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA)

United States v. Kerr, 737 F.3d 33 (4th Cir. Dec. 3, 2013) (Diaz, J.; Davis, J., dissenting) (M.D.N.C.) (defendant's convictions and sentences under North Carolina's Structured Sentencing Act constituted felonies for purposes of sentencing pursuant to ACCA where defendant's presumptive range set a maximum sentence of 14 months; thus, defendant faced sentence in excess

of one year in prison, even though state judge sentenced defendant within lower mitigating range, which set maximum of only 11 months' imprisonment)

! *United States v. Royal*, 731 F.3d 333 (4th Cir. Oct. 1, 2013) (Diaz, J.) (D. Md.) (finding that Maryland offense of second degree assault, Md. Code, Crim. Law § 3-203(a), is indivisible and that "offensive physical contact" and "physical harm" are alternative means of committing one element of offense, not alternative elements; applying categorical approach and concluding that offense is not violent felony because it reaches any unlawful touching, no matter how slight)

! *United States v. Hemingway*, 734 F.3d 323 (4th Cir. Oct. 31, 2013) (King, J.) (D.S.C.) (in first appellate decision to apply divisibility analysis of *Descamps v. United States*,133 S. Ct. 2276 (June 20, 2013), to common law crime, finding that South Carolina offense of assault and battery of a high and aggravated nature (ABHAN) is not subject to modified categorical approach and is not categorically a violent felony under ACCA's residual clause) (N.B.: South Carolina codified the ABHAN offense in 2010); *see also United States v. Montes-Flores*, 736 F.3d 357 (4th Cir. Nov. 26, 2013) (Thacker, J.; Shedd, J., dissenting) (D.S.C.), *infra* U.S.S.G. § 2L1.2, Illegal Reentry

United States v. Hunter, 735 F.3d 172 (4th Cir. Nov. 13, 2013) (Wynn, J.) (E.D.N.C.) (holding that application of ACCA based on defendant's prior convictions for violent felonies he committed as juvenile, for which he was prosecuted as an adult, does not violate Eighth Amendment)

United States v. McDowell, ___ F.3d ____, 2014 WL 960256 (4th Cir. Mar. 11, 2014) (Motz, J.) (E.D.N.C.) (in case involving proof of existence of forty-plus-year-old conviction, finding evidence of NCIC criminal record check report sufficient to establish fact of conviction in light of applicable standard of proof at sentencing and deferential standard of review; finding no constitutional error in use of report in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but recognizing force of defendant's constitutional argument where rationales justifying *Almendarez-Torres* were entirely missing in this case, and suggesting that Supreme Court should reconsider *Almendarez-Torres*)

18 U.S.C. § 981, Forfeiture

United States v. Hasan, 718 F.3d 338 (4th Cir. June 6, 2013) (Agee, J.) (E.D. Va.) (district court did not err in using gross proceeds, rather than profits, from contraband cigarette distribution scheme to determine dollar amount to be forfeited; treating contraband cigarettes as illegal goods, not lawful goods distributed in illegal manner)

United States v. Blackman, ___ F.3d ____, 2014 WL 1099271 (4th Cir. Mar. 21, 2014) (Wilkinson, J.) (E.D. Va.) (on appeal by government, finding that forfeiture statutes, when read in conjunction with one another, mandate imposition of forfeiture as part of sentence, even when court also orders restitution)

18 U.S.C. § 3583, Supervised Release

United States v. Newhauser, ___ F.3d ____, 2014 WL 960478 (4th Cir. Mar. 11, 2014) (Motz, J.) (E.D.N.C.) (term of supervised release does not begin to run until defendant is freed from confinement, even when defendant is detained only civilly after he completes his sentence of imprisonment for a crime, during litigation to determine whether he is sexually dangerous person)

18 U.S.C. §§ 3663, 3663A, Restitution

! * *United States v. Davis*, 714 F.3d 809 (4th Cir. May 1, 2013) (Motz, J.) (E.D.N.C.) (on plain error review in case arising out of defendant's theft of firearm during burglary of residence, reversing restitution order where restitution is not authorized for offense of possession of stolen firearm because homeowner was not "victim" of conduct that was basis for offense of conviction within meaning of 18 U.S.C. § 3663; further, restitution was not otherwise permitted under terms of plea agreement, which limited restitution "pursuant to" restitution statutes)

! *United States v. Grant*, 715 F.3d 552 (4th Cir. May 9, 2013) (Traxler, J.; Shedd, J., concurring) (E.D. Va.) (holding that district court abused its discretion in modifying conditions of probation to add new special condition requiring defendant to apply tax refunds and other money received from anticipated or unexpected financial gains toward restitution where court failed to make findings about any material change in defendant's ability to pay restitution or about impact of new condition on defendant's ability to support herself and her family)

! * *United States v. Freeman*, 741 F.3d 426 (4th Cir. Jan. 17, 2014) (Thacker, J.) (D. Md.) (reversing condition of supervised release ordering payment of restitution where purported victims to whom restitution was to be paid were not victims of the offense of conviction, i.e., the specific conduct forming basis for conviction) (N.B.: decision provides overview of the various statutes relating to payment of restitution and their relationship to one another)

United States v. Abdelbary, ___ F.3d ____, 2014 WL 929422 (4th Cir. Mar. 11, 2014) (Traxler, J.; Diaz, J., dissenting) (W.D. Va.) (in bankruptcy fraud case, holding that attorneys fees incurred by company pursuing claim against defendant during his bankruptcy proceedings were properly included as compensable costs in amount owed as restitution under mandatory restitution provision in § 3663A)

21 U.S.C. § 841 *et seq.*, Drug Offenses

! *United States v. Allen*, 716 F.3d 98 (4th Cir. Apr. 26, 2013) (Gregory, J.) (W.D.N.C.) (defendant was entitled to resentencing applying lower mandatory minimum in light of *Dorsey v. United States*, 132 S. Ct. 2321 (2012), where although defendent committed offense prior to passage of Fair Sentencing Act, he was not sentenced until after Act took effect)

Sentencing Guidelines

U.S.S.G. § 1B1.3, Relevant Conduct

United States v. Ashford, 718 F.3d 377 (4th Cir. June 20, 2013) (Diaz, J.) (D.S.C.) (in case involving challenge to application of cross-reference in U.S.S.G. § 2K2.1 to guideline for attempted second-degree murder, a non-groupable offense under U.S.S.G. § 3D1.2, ruling that relevant conduct guideline does not exclude a non-groupable offense from serving as basis for cross-reference so long as cross-referenced offense was committed during commission of offense of conviction, or in preparation for latter offense or avoiding detection or responsibility for it; i.e., it constitutes relevant conduct under § 1B1.3(a)(1) rather than under (a)(2))

United States v. McGee, 736 F.3d 263 (4th Cir. Nov. 18, 2013) (Davis, J.) (S.D. W. Va.) (where police stopped defendant on one day at bus station and found large amount of cash on him for which he did not have good explanation, and then stopped him again barely two weeks later on interstate highway as passenger in rental car in which drugs were found, district court did not err in treating cash found on defendant at bus station as drug proceeds, and part of same course of conduct drugs found in car, and converting cash to drug weight)

U.S.S.G. § 2B1.1, Fraud

United States v. McLean, 715 F.3d 129 (4th Cir. Apr. 23, 2013) (Gregory, J.) (D. Md.) (in health care fraud case, district court did not err in including costs for follow-up testing or hospital's losses where tests and losses would not have occurred but for performance of medically unnecessary tests in the first instance)

United States v. Abdulwahab, 715 F.3d 521 (4th Cir. Apr. 29, 2013) (Traxler, J.) (E.D. Va.) (district court did not err in holding defendant in investment fraud scheme responsible for losses of funds invested with company before defendant became equity partner in company)

United States v. Jones, 716 F.3d 851 (4th Cir. May 29, 2013) (Diaz, J.) (E.D. Va.) (rejecting defendant's contention that it was not reasonably foreseeable to him that co-conspirators would continue to receive naval base housing allowance payments after they confessed to fraud scheme because "it is entirely foreseeable that losses caused by a fraudulent scheme will not cease the moment that co-conspirators confess to the fraud")

United States v. Keita, 742 F.3d 184 (4th Cir. Feb. 6, 2014) (Wynn, J.) (D. Md.) (affirming calculation of loss amount in credit and debit card fraud case where detective testified at sentencing hearing about his preparation of chart tracking fraudulent transactions)

U.S.S.G. § 2D1.1 *et seq*., Drug Offenses

United States v. Crawford, 734 F.3d 339 (4th Cir. Nov. 1, 2013) (Floyd, J.) (E.D.N.C.) (district court did not abuse discretion in relying on hearsay within hearsay – police officer's testimony about another police officer's telephone interviews of two informants – to set drug

quantity where court found that information was sufficiently reliable to serve as basis for quantity calculation)

United States v. McGee, 736 F.3d 263 (4th Cir. Nov. 18, 2013) (Davis, J.) (S.D. W. Va.) (where police stopped defendant on one day at bus station and found large amount of cash on him for which he did not have good explanation, and then stopped him again barely two weeks later on interstate highway as passenger in rental car in which drugs were found, district court did not err in treating cash found on defendant at bus station as drug proceeds, and part of same course of conduct drugs found in car, and converting cash to drug weight)

U.S.S.G. § 2G2.2, Child Pornography

! * *United States v. McManus*, 734 F.3d 315 (4th Cir. Oct. 30, 2013) (Duncan, J.) (M.D.N.C.) (in case involving filesharing through Gigatribe, district court improperly applied five-level enhancement in § 2G2.2(b)(3)(B), distribution of child pornography for the receipt, or expectation of receipt, of a thing of value but not for pecuniary gain, where government failed to establish that defendant had specific purpose, not merely a hope, of receiving some kind of benefit in exchange for distribution; rejecting government's per se rule that use of file sharing program implies inherent reciprocity)

United States v. Cox, ___ F.3d ____, 2014 WL 842105 (4th Cir. Mar. 5, 2014) (Diaz, J.) (D.S.C.) (evidence was sufficient to support application of cross-reference in U.S.S.G. § 2G2.2 to § 2G2.1 for causing minor to engage in sexually explicit conduct for purpose of producing child pornography; "purpose" as used in cross-reference need not be exclusive, or even primary, purpose so long as it is one of defendant's purposes in creating visual depiction)

U.S.S.G. § 2K2.1 *et seq.*, Firearms Offenses

United States v. Harris, 720 F.3d 499 (4th Cir. June 26, 2013) (Niemeyer, J.) (E.D.N.C.) (with respect to application of four-level enhancement for altered or obliterated serial number, serial number is "altered" if it is made less legible, even if not completely illegible)

United States v. Ashford, 718 F.3d 377 (4th Cir. June 20, 2013) (Diaz, J.) (D.S.C.) (in case involving challenge to application of cross-reference to guideline for attempted second-degree murder, a non-groupable offense under U.S.S.G. § 3D1.2, ruling that relevant conduct guideline, U.S.S.G. § 1B1.3, does not exclude a non-groupable offense from serving as basis for cross-reference so long as cross-referenced offense was committed during commission of offense of conviction, or in preparation for latter offense or avoiding detection or responsibility for it; i.e., it constitutes relevant conduct under § 1B1.3(a)(1) rather than under (a)(2))

U.S.S.G. § 2L1.2, Illegal Reentry After Removal

United States v. Medina-Campo, 714 F.3d 232 (4th Cir. Apr. 18, 2013) (King, J.) (D. Md.) (in decision predating *Descamps v. United States*, 133 S. Ct. 2276 (June 20, 2013), ruling that Oregon offense of soliciting delivery of drugs is not an offense separate from attempting or

completing delivery, and thus modified categorical approach does not apply because statute is not divisible; concluding that solicitation of delivery categorically qualifies as drug trafficking offense for purposes of 16-level enhancement)

United States v. Medina, 718 F.3d 364 (4th Cir. June 10, 2013) (Wilkinson, J.) (D. Md.) (diversionary disposition of probation before judgment constitutes predicate conviction for purpose of imposing enhancement under illegal reentry guideline)

! *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. Aug. 26, 2013) (Traxler, J.) (D. Md.) (whereas Maryland child abuse statute, Md. Code, art. 27, § 35C, is generally divisible into offenses involving physical abuse or sexual abuse, sexual abuse prong does not constitute either "forcible sex offense" or "sexual abuse of minor" within meaning of § 2L1.2's definitions of those terms)

! *United States v. Montes-Flores*, 736 F.3d 357 (4th Cir. Nov. 26, 2013) (Thacker, J.; Shedd, J., dissenting) (D.S.C.) (finding that South Carolina common law offense of assault and battery of a high and aggravated nature (ABHAN) is not subject to modified categorical approach and is not categorically a crime of violence under § 2L1.2's definition of that term because it does not categorically involve the use, attempted use, or threatened use of physical force against a person); *see also United States v. Hemingway*, 734 F.3d 323 (4th Cir. Oct. 31, 2013) (King, J.) (D.S.C.), *supra* 18 U.S.C. § 924(e), Armed Career Criminal Act

United States v. Perez-Perez, 737 F.3d 950 (4th Cir. Dec. 18, 2013) (Davis., J.) (E.D.N.C.) (finding that North Carolina offense of indecent liberties with a minor, N.C. Gen. Stat. § 14-202.1(a), constitutes "sexual abuse of a minor," and therefore a "crime of violence" under § 2L1.2; distinguishing *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (en banc) because it addressed definition of "violent felony" in 18 U.S.C. § 924(e), not definition of "sexual abuse of a minor" in § 2L1.2) (N.B.: Judge Davis also wrote a concurring opinion in which he calls for reconsideration of *United States v. Diaz-Ibarra*, 522 F.3d. 343 (4th Cir. 2008), which he believed controlled the outcome of this case)

! *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. Jan. 14, 2014) (en banc) (Davis, J.; Wilkinson, J., dissenting) (D. Md.) (on en banc reconsideration, holding that Maryland offense of resisting arrest, Md. Code, Crim. Law. § 9-408(b)(1), is not a crime of violence for purposes of enhancement in illegal reentry guideline because offense does not have as element the use, attempted use, or threatened use of physical force against the person of another)

U.S.S.G. § 3A1.4, Terrorism

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (reviewing substantive and procedural requirements for application of enhancement, and reviewing challenges to its application to each of three defendants)

U.S.S.G. § 3B1.1 *et seq.*, Role in Offense

United States v. Steffen, 741 F.3d 411 (4th Cir. Dec. 20, 2013) (Keenan, J.) (D.S.C.) (to apply three-level enhancement for being manager or supervisor, defendant must actually manage or supervise other people participating in offense, not simply property; district court did not clearly err in finding that defendant here, a state trooper, managed one other person by following co-conspirator who was transporting marijuana, to prevent other troopers from stopping co-conspirator, and by transferring electric bill for a property to other co-conspirator's name; such actions demonstrated exercise of authority over other participant and management decision about assignment of risk of exposure)

U.S.S.G. § 4A1.1 *et seq.*, Criminal History

United States v. Robinson, ___ F.3d ____, 2014 WL 661574 (4th Cir. Feb. 21, 2014) (Motz, J.) (E.D.N.C.) (where defendant pled guilty to conspiring to sell cocaine from 2002 to 2011, and had been found guilty of marijuana possession in 2003, district court did not clearly err in treating 2003 conviction as "prior sentence" rather than as "relevant conduct," and criminal history point was correctly assigned)

United States v. Robinson, ___ F.3d ____, 2014 WL 661574 (4th Cir. Feb. 21, 2014) (Motz, J.) (E.D.N.C.) (where defendant pled guilty to conspiring to sell cocaine from 2002 to 2011, and had been found guilty of marijuana possession in 2003, for which he received one day of probation, two criminal history points were properly assigned for committing conspiracy offense while under a criminal justice sentence)

U.S.S.G. § 4B1.1 *et seq.*, Career Offender

! *United States v. Davis*, 720 F.3d 215 (4th Cir. June 24, 2013) (Gregory, J.) (W.D.N.C.) (holding that consolidated sentence under North Carolina law counts only as single sentence for career offender guideline; distinguishing between "consolidated for sentencing," a procedural mechanism, and a "consolidated sentence," which affects substantive rights)

! *United States v. Carthorne*, 726 F.3d 503 (4th Cir. Aug. 13, 2013) (Keenan, J.) (M.D.N.C.) (Virginia offense of assault and battery of police officer (ABPO), Va. Code § 18.2-57(C) – as distinct from separate offense of assault on police officer also set forth in same statute – is not categorically a crime of violence, because offense referenced in statute is defined by common law, the elements of which do not create serious potential risk of injury in usual case, but on plain error review, declining to find that error is plain)

U.S.S.G. § 6A1.3, Resolution of Disputed Factors

United States v. Crawford, 734 F.3d 339 (4th Cir. Nov. 1, 2013) (Floyd, J.) (E.D.N.C.) (district court did not abuse discretion in relying on hearsay within hearsay – police officer's testimony about another police officer's telephone interviews of two informants – to set drug

quantity where court found that information was sufficiently reliable to serve as basis for quantity calculation)

Conditions of Probation and Supervised Release

! *United States v. Grant*, 715 F.3d 552 (4th Cir. May 9, 2013) (Traxler, J.; Shedd, J., concurring) (E.D. Va.) (holding that district court abused its discretion in modifying conditions of probation to add new special condition requiring defendant to apply tax refunds and other money received from anticipated or unexpected financial gains toward restitution where court failed to make findings about any material change in defendant's ability to pay restitution or about impact of new condition on defendant's ability to support herself and her family)

! * *United States v. Freeman*, 741 F.3d 426 (4th Cir. Jan. 17, 2014) (Thacker, J.) (D. Md.) (reversing condition of supervised release ordering payment of restitution where purported victims to whom restitution was to be paid were not victims of the offense of conviction, i.e., the specific conduct forming basis for conviction) (N.B.: decision provides overview of the various statutes relating to payment of restitution and their relationship to one another)

Reasonableness of Sentence

United States v. Weon, 722 F.3d 583 (4th Cir. July 17, 2013) (Keenan, J.) (D. Md.) (sentence was not procedurally unreasonable where district court refused to consider defendant's evidence that actual tax loss was far less than amount of loss to which defendant had stipulated in plea agreement; district court did not err in holding that defendant was bound by loss figure in agreement) (N.B.: while a bad outcome for this defendant, the principles involved should be helpful when the government tries to present evidence or argument for loss amounts (or other aggravating factors) in excess of what it has agreed to)

United States v. Washington, 743 F.3d 938 (4th Cir. Feb. 28, 2014) (Diaz, J.) (E.D. Va.) (in case where range in 18 U.S.C. § 2423 (transportation of minor) case was 135 to 168 months and court considered range before sentencing defendant to 240 months, court's decision to vary and extent of variance were reasonable given court's consideration of how defendant treated victim, his unrepentant actions, and his extensive criminal history)

Reductions in Sentence

United States v. Smalls, 720 F.3d 193 (4th Cir. June 19, 2013) (Motz, J.) (E.D. Va.) (on appeal from partial granting of defendant's § 3582(c) motion based on 2010 retroactive amendment to drug guideline, for which district court used form document and did not provide specific, individualized explanation for reducing sentence only to high end of new, lowered range, holding that *United States v. Legree*, 205 F.3d 724 (4th Cir. 2000), continues to be good law, that it does not require an extensive explanation for § 3582(c) sentence adjustments, and that defendant did not overcome presumption that court considered relevant s 3553(a) factors and other pertinent matters)

United States v. Black, 737 F.3d 280 (4th Cir. Dec. 6, 2013) (Niemeyer, J.; King, J., concurring) (E.D.N.C.) (on appeal from denial of § 3582(c) motion, reiterating holding in *United States v. Bullard*, 645 F.3d 237 (4th Cir. 2011), that Fair Sentencing Act does not apply retroactively to defendants who were sentenced before Act took effect; further holding that § 3582(c) proceeding begun after Act took effect is not new sentencing proceeding at which Act can be applied)

X. REVOCATION ISSUES

Sentencing

United States v. Webb, 738 F.3d 638 (4th Cir. Dec. 19, 2013) (Floyd, J.) (W.D. Va.) (district court's mere reference to § 3553(a) factor not specified by Congress for consideration in sentencing for supervised release violation, without more, did not automatically make sentence procedurally unreasonably; acknowledging, though, that result might be different if sentence was based predominantly on unspecified factor (seriousness of violation, or need for sentence to promote respect for law and provide just punishment))

XI. APPELLATE ISSUES

Reviewability of Issues

United States v. Ashford, 718 F.3d 377 (4th Cir. June 20, 2013) (Diaz, J.) (D.S.C.) (rejecting government's attempt to argue that defendant had waived issue on appeal (such that issue should be reviewed only for plain error) where government raised argument, not in its response brief but only in F.R.A.P. 28(j) letter filed shortly before oral argument)

United States v. Weon, 722 F.3d 583 (4th Cir. July 17, 2013) (Keenan, J.) (D. Md.) (declining to enforce appeal waiver against defendant where waiver provided that defendant reserved right to appeal from any sentence above the advisory guidelines range resulting from an adjusted base offense level of 19, and district court found that adjusted base offense level was 20)

United States v. Carthorne, 726 F.3d 503 (4th Cir. Aug. 13, 2013) (Keenan, J.) (M.D.N.C.) (in reviewing issue for plain error, noting that government defaulted any argument that defendant had entirely waived, not simply forfeited, argument when government urged in its brief and at oral argument that court apply plain error standard)

United States v. Bartko, 728 F.3d 327 (4th Cir. Aug. 23, 2013) (Floyd, J.) (E.D.N.C.) (defendant waived issue about *Brady* violation on appeal where, although he set forth relevant facts in fact section of opening brief, he made only passing reference to them in argument and never claimed until reply brief, in a footnote, that *Brady* violation was component of argument)

United States v. Zayyad, 741 F.3d 452 (4th Cir. Jan. 24, 2014) (Agee, J.) (W.D.N.C.) (where defendant challenges evidence on one evidentiary ground before district court but challenges

evidence on a different evidentiary ground on appeal, court of appeals will review issue only for plain error; "[t]o preserve an argument on appeal, the defendant must object on the same basis below as he contends is error on appeal . . . [s]o even if a defendant invokes the same rule in both instances, he may still waive his claim if he fashioned his argument differently")

United States v. Mosteller, 741 F.3d 503 (4th Cir. Feb. 4, 2014) (Keenan, J.) (D.S.C.) (when district court granted mistrial on condition that defendant waive statutory speedy trial right, and second trial occurred more than 70 days after mistrial but defendant did not move to dismiss indictment on basis of statutory speedy trial violation, defendant cannot assert Speedy Trial Act violation for first time on appeal, and appellate court cannot review issue even for plain error, even though defendant's attempt to waive speedy trial right was null and void; noting, however, that Sixth Amendment speedy trial claim can still be made on plain error review even though not raised below)

* *United States v. Robinson*, ___ F.3d ____, 2014 WL 661574 (4th Cir. Feb. 21, 2014) (Motz, J.; Diaz, J., dissenting in part) (E.D.N.C.) (where court offered defendant choice between proceeding with sentencing hearing or having three-month continuance so that he could challenge drug weight calculation and defendant elected to proceed with hearing, defendant validly waived, not merely forfeited, argument regarding sufficiency of evidence supporting calculation, such that court of appeals would not consider it at all rather than applying plain error review) (N.B.: decision contains good discussion regarding forfeiture v. waiver v. invited error)

Standards of Review

Clear Error Review

United States v. Steffen, 741 F.3d 411 (4th Cir. Dec. 20, 2013) (Keenan, J.) (D.S.C.) (discussing clear error standard in context of appeal of U.S.S.G. § 3B1.1, aggravating role enhancement)

De Novo Review

United States v. Hassan, 742 F.3d 104 (4th Cir. Feb. 4, 2014) (King, J.) (E.D.N.C.) (noting circuit split regarding standard of review, de novo or abuse of discretion, applicable to district court's determination that FISA application established probable cause; Fourth Circuit applied de novo review)

Harmless Error Review

United States v. Montes-Flores, 736 F.3d 357 (4th Cir. Nov. 26, 2013) (Thacker, J.; Shedd, J., dissenting) (D.S.C.) (in context of Sentencing Guidelines application error, discussing harmless error standard and determinations appellate court must make in assessing harm or lack thereof)

Plain Error Review

United States v. Carthorne, 726 F.3d 503 (4th Cir. Aug. 13, 2013) (Keenan, J.; Davis, J., dissenting) (M.D.N.C.) (although finding error in district court's refusal to find that Virginia assault and battery of police officer is not crime of violence, declining to find that error was plain where Fourth Circuit had not previously addressed specific issue, case raising related issue was not binding precedent, and other circuits were split on issue)

Mandate Rule (Scope of Mandate)

United States v. Alston, 722 F.3d 603 (4th Cir. July 17, 2013) (Agee, J.) (E.D.N.C.) (where, at original sentencing district court had denied government's request for upward departure pursuant to U.S.S.G. § 4A1.3 and government did not cross-appeal that denial, on remand from defendant's direct of appeal of sentencing, district court did not violate mandate rule by considering and granting new government request for upward departure)